

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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| Pacific Gas and Electric Company (U 39-E), for approval of the 2006 – 2008 Energy Efficiency Programs and Budget. | Application 05-06-004 (Filed June 1, 2005) |
| Southern California Gas Company (U 904-G) for approval of Natural Gas Energy Efficiency Programs and Budgets for Years 2006 through 2008. | Application 05-06-011 (Filed June 1, 2005) |
| Southern California Edison Company (U 338-E), for Approval of its 2006 – 2008 Energy Efficiency Program Plans and associated Public Goods Charge (PGC) and Procurement Funding Requests. | Application 05-06-015 (Filed June 2, 2005) |
| San Diego Gas & Electric Company (U 902-E) for Approval of Electric and Natural Gas Energy Efficiency Programs and Budgets for Years 2006 through 2008. | Application 05-06-016 (Filed June 2, 2005) |

APPLICATION FOR REHEARING OF DECISION 06-12-013

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On Behalf of **Division of Ratepayer
Advocates**

January 16, 2007

APPLICATION FOR REHEARING OF DECISION 06-12-013

I. Introduction

On December 14, 2006, the Commission issued Decision (D.) 06-12-013, *Order Approving Southern California Edison Company Petition for Modification of Decision 05-09-043, With Modifications*. Decision 06-12-013 modifies D.05-09-043 to authorize Southern California Edison Company (SCE) to record up to \$14 million in its Procurement Energy Efficiency Balancing Account (PEEBA) from existing unspent, uncommitted energy efficiency monies to fund “Palm Desert Project” expenditures during the 2006-2008 Energy Efficiency program cycle.¹ The Palm Desert Project is a “demonstration partnership” between SCE, the City of Palm Desert, and the Energy Coalition, which will act as a liaison between the utility and the City.² The Commission has authorized SCE to use the additional \$14 million to promote energy efficiency in Palm Desert by increasing education, outreach, and direct incentives for some of the energy efficiency measures currently offered in Palm Desert via SCE’s 2006-2008 energy efficiency portfolio.³ Additionally, D.06-12-013 authorizes SCE to fund thermal energy storage (TES) measures as a load management strategy within the Palm Desert Project, on a nonprecedential, pilot basis.⁴

Pursuant to Rule 16.1 of the Commission’s Rules of Practice and Procedure (Rule 16.1), The Utility Reform Network (TURN) and the Division of Ratepayer Advocates (DRA) submit this application for rehearing of D.06-12-013. TURN and DRA seek either clarification or rehearing on the limited issue of the decision’s treatment of TES. Decision 06-12-013 is silent

¹ D.06-12-013, Ordering Paragraph 1.

² Id., pp. 20-21.

³ Id., p. 4.

⁴ Id., p. 19.

regarding whether the TES Pilot may be considered part of SCE's 2006-2008 energy efficiency portfolio for purposes of determining whether SCE met its energy efficiency goals and calculating an energy efficiency shareholder incentives award for SCE. If the Commission remains silent, SCE may interpret this silence as authorizing it to include impacts from TES in its energy efficiency portfolio.⁵ As discussed below, D.06-12-013 will violate § 1705 of the California Public Utilities Code (PU Code) and the requirement of PU Code § 1757 that Commission decisions be supported by substantial evidence if it permits this outcome, which is wholly unsupported by the findings and evidence in this proceeding. Accordingly, TURN and DRA request that the Commission either clarify that it did not intend to authorize SCE to include TES in the evaluation of its energy efficiency portfolio when it issued D.06-12-013, or grant rehearing of D.06-12-013 on this limited issue. Absent clarification, rehearing is warranted for the reasons discussed below.

Rule 16.1(a) provides that an application for rehearing shall be filed within 30 days after the date the Commission mails the order or decision. The Commission mailed D.06-12-013 on December 15, 2006, making the filing deadline Sunday, January 14, 2007. However, when the due date would otherwise fall on a Saturday, Sunday, holiday or other day when the Commission offices are closed, Rule 1.14 extends the filing deadline to the first business day thereafter. Because Monday, January 15, 2007 was a Commission holiday, this application for rehearing is timely filed on Tuesday, January 16, 2007.

⁵ TURN and DRA would not support this interpretation of D.06-12-013, but we recognize that SCE may act upon the Commission's silence as if it were implicit authorization.

II. Standard of Review

Rule 16.1(c) directs an applicant for rehearing to “set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous,” making specific references to the record or law. PU Code § 1705 requires Commission decisions to be based on “findings of fact and conclusions of law on all issues material to the order or decision.” When a reviewing court undertakes consideration of the validity of a Commission decision pursuant to PU Code § 1757, it considers, among other features, whether the decision is supported by the findings and whether the findings in the decision are supported by “substantial evidence in light of the whole record.”⁶

The California Supreme Court has defined "substantial evidence" to mean evidence of "ponderable legal significance ... reasonable in nature, credible, and of solid value."⁷ Substantial evidence is not synonymous with "any evidence." Thus, an agency decision will not be upheld if it relies on evidence which is inherently improbable⁸ or contrary to facts which are universally accepted as true.⁹ In determining whether there is "substantial evidence," the court may not consider the evidence which supports the agency's findings in isolation. Rather, it must consider

⁶ Cal. PU Code §§ 1757(a)(3)-(4). Section 1756 provides that a party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of a Commission order inquired into and determined. Section 1757(a) provides that in a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties, the review by the court shall not extend further than to determine on the basis of the entire record whether any of the following occurred: “(1) The commission acted without, or in excess of, its powers or jurisdiction. (2) The commission has not proceeded in the manner required by law. (3) The decision of the commission is not supported by the findings. (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record. (5) The order or decision of the commission was procured by fraud or was an abuse of discretion. (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.”

⁷ People v. Basset, 69 Cal.2d 122, 138-39 (1968).

⁸ Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center, 62 Cal. App. 4th 1123 (1998).

⁹ Larson v. State Personnel Bd., 60 Cal. App.3d 58, 68 (1968).

all the relevant evidence in the case, including evidence that contradicts the agency's findings.¹⁰ Moreover, even when the Commission purportedly has some “evidence” to support an outcome, rehearing is still appropriate where the probative value of that evidence is questionable. For example, the Commission has found legal error where the findings are “incomplete,” and the order fails to sufficiently elaborate on its conclusions.¹¹ The Commission has also granted rehearing where evidence is not reliable and where it is premised on “incorrect assumptions” or is “too generalized or speculative” to be legally sufficient.¹²

III. Argument: D.06-12-013 Errs in Its Treatment of TES By Violating PU Code §§ 1705 and 1757, Which Require Sufficient Findings and Record Support For Commission Decisions.

TES is a load management strategy which permanently shifts load from peak to off-peak periods.¹³ The Commission has long distinguished between energy efficiency activities and load management programs when requiring ratepayers to fund these Demand Side Management utility investments, as well as when considering whether utilities should earn shareholder incentives for these activities.¹⁴ In D.05-04-051 the Commission reaffirmed its historic practice of distinguishing between energy efficiency measures and load management technologies and

¹⁰ Bixby v. Pierno, 4 Cal. 3d 130, 143 (1971), citing Universal Camera Corp. v. NLRB, 340 US 474 (1951); Newman v. State Personnel Bd., 10 Cal. App. 4th 41 (1992).

¹¹ D.99-11-029, 1999 Cal. PUC LEXIS 862, *2, *9; D.99-06-093, 1999 Cal. PUC LEXIS 442, *7.

¹² D.99-03-026, 1999 Cal. PUC LEXIS 369, *13-14. *See also* D.99-11-052, 1999 Cal. PUC LEXIS 837, *23 (“It is the task of the Commission to articulate the reasons justifying the actions that the Commission orders.”).

¹³ D.06-12-013, p. 18; *See also* D.06-11-049, p. 49.

¹⁴ *See i.e.* D.93-11-017, Attachment 1 (“Adopted Rules, Terms and Definitions for Demand-Side Management Programs”); D.94-10-059, 1994 Cal. PUC Lexis 679, *12 (adopting shareholder incentives for energy efficiency but not load management); D.97-12-103, 1997 Cal. PUC Lexis 1226, *4 (directing the utilities to create separate balancing accounts for post-1997 energy efficiency activities, as opposed to other Demand Side Management programs, which would be funded through the newly legislated Public Goods Charge); The California Standard Practice Manual 2001, CEC, Chapter 1 (Section: Demand-Side Management Categories and Program Definitions); D.05-04-051, Attachment 3 (Energy Efficiency Policy Manual for Post-2005 Programs).

excluding load management from energy efficiency program funding. While updating the Energy Efficiency Policy Rules for application in post-2005 program funding cycles, the Commission explained, “The rules in this manual do not currently apply to: [bullet 3] Interruptible rate or load management programs.”¹⁵ Thus, pursuant to the Commission’s well-established policies, “as a load-shifting technology, TES is currently precluded as an energy efficiency measure” in SCE’s 2006-2008 energy efficiency programs.¹⁶

Nonetheless, D.06-12-013 authorizes SCE to fund TES as part of the Palm Desert Project, which SCE will implement as part of its 2006-2008 energy efficiency portfolio of programs. Finding that “Thermal Energy Storage is not an energy efficiency program under adopted Commission guidelines” and “Thermal Energy Storage may decrease peak demand, and may or may not increase energy usage,” the Commission reached the following conclusion: “Thermal Energy Storage, while not an energy efficiency program under adopted Commission guidelines, can and should be allowed as a non-precedential pilot program as part of the Palm Desert Project.”¹⁷ The Commission further explained its rationale for suspending long-held Commission policy:

“[B]ureaucratic boundaries, when unconstrained by statute or other binding legal authority, should not be used to limit our discretion to conduct a pilot program with potentially beneficial results. We do not know for certain that TES will be beneficial either in Palm Desert or on a wider scale. We do know that there are both potential benefits from reducing peak load (one aspect of energy efficiency) and potential downsides to TES. Here, we have before us a specific, limited, pilot proposal to test the viability of TES through SCE’s Project without regard for whether it should be categorized as “energy efficiency,” “demand-side management” – or either or neither. We consider TES to be a potentially

¹⁵ D.05-04-051, Attachment 3, Introduction.

¹⁶ See D.06-12-013, p. 18, Finding of Fact 5.

¹⁷ D.06-12-013, Findings of Fact 5, 6, Conclusion of Law 6.

innovative technology for the future. It is reasonable to test TES in the context of the Palm Desert Project.”¹⁸

It may well be reasonable to test TES in the City of Palm Desert, but the Commission has failed to sufficiently support its conclusion that TES should be implemented in the Palm Desert Project, *to the extent that the impacts of the TES pilot will be evaluated as part of SCE’s 2006-2008 energy efficiency portfolio*. D.06-12-013 is erroneously silent in this regard, and therein lies its legal fallacy.

TURN and DRA do not oppose the Commission’s commitment to evaluating whether or not TES actually saves energy.¹⁹ However, to the extent that D.06-12-013 authorizes SCE to count peak demand and / or energy savings from the TES pilot towards its 2006-2008 *energy efficiency* goals (established by the Commission in D.04-09-060), or to claim *energy efficiency* shareholder incentives from TES performance, D.06-12-013 will have an impact utterly unsupported by – in fact, contradicted by -- the Commission’s findings that TES is specifically disallowed as an energy efficiency measure.

Moreover, allowing SCE to count savings from TES towards its 2006-2008 energy efficiency goals will contradict the Commission’s clear directive in D.04-09-060, which established the energy efficiency goals SCE is expected to meet with its 2006-2008 energy efficiency portfolio. In D.04-09-060, the Commission explained, “Electric and natural gas savings from *energy efficiency* programs funded by ratepayers through the public goods charge (PGC) and procurement rates will contribute to these goals, including those achieved through the low-income energy efficiency (LIEE) program.”²⁰

¹⁸ D.06-12-013, p. 19.

¹⁹ See *i.e.* TURN Comments filed in A.05-06-006 et al., Sept. 20, 2006.

²⁰ D.04-09-060, p. 2 (emphasis added).

Similarly, allowing SCE to count savings from TES will conflict with D.04-09-060 in another regard. As D.04-09-060 explains, the goals themselves were derived from studies which presented estimates of “the potential to increase the number of energy efficiency investments made by customers and businesses in specific segments over the next decade,” by examining market saturation for a list of over 200 energy efficiency measures for the residential, commercial and industrial sectors.²¹ Thus, the Commission did not consider the potential for energy savings from customers who might install TES when it adopted the energy efficiency goals in D.04-09-060, since TES is not an energy efficiency measure. In fact, the Commission instructed the utilities to exclude “savings by customers not included in the calculation of savings potential” when “documenting program accomplishments” ... “in order to ensure consistency between the basis for establishing the goals and the assessment of whether those goals have been met.”²² Hence, D.06-12-013 violates this principle of consistency to the extent that it allows SCE to include savings from TES when calculating the accomplishments of its 2006-2008 energy efficiency portfolio towards the goals established by D.04-09-060.

Lacking any record support, let alone supportive findings, for the aforementioned deviations from well-established Commission policy, D.06-12-013 is inconsistent with §§ 1705 and 1757 of the PU Code and is erroneous. TURN and DRA urge the Commission to grant rehearing of D.06-012-013 to the extent necessary to order that the TES pilot it authorizes will *not be part of SCE’s energy efficiency portfolio*, or at least issue an order clarifying that the Commission’s intent was not to include the TES pilot in the energy efficiency portfolio.

The Commission could also remedy the defect in D.06-12-013 by removing authorization for the TES pilot as part of the Palm Desert Project, and recommending that SCE consider

²¹ Id., p. 8.

²² Id., p. 31, *see also* Finding of Fact 9.

funding TES in Palm Desert from its demand response budget, pursuant to D.06-11-049. The Commission has authorized SCE to spend \$10 million of its existing 2006-2008 demand response budget to pursue permanent load shifting opportunities, including TES.²³ In D.06-11-049, the Commission “direct[ed] the utilities to pursue RFPs and bilateral arrangements by which they can solicit five-year proposals from third parties for permanent load shifting that can be implemented by summer 2007,” and allowed the use of demand response Technical Assistance / Technical Incentives (TA/TI) funds toward offsetting the initial costs of installation.²⁴ Now that SCE has Commission authorization to deploy permanent load shifting technologies via an RFP process, the Commission need not look to the Palm Desert Project to provide “a specific, limited, pilot proposal to test the viability of TES.”²⁵ SCE can deploy TES in its service territory without special authorization from the Commission in the instant proceeding.²⁶

Alternatively, if the Commission affirms D.06-12-013’s inclusion of TES in the Palm Desert Project, and therefore, as an element of SCE’s 2006-2008 energy efficiency portfolio, the Commission should at a minimum grant rehearing of D.06-012-013 to clarify how the TES pilot should be evaluated. Because D.06-12-013 authorizes SCE to fund TES only on a pilot basis, it would be wholly appropriate to exclude TES from the calculation of rewards or penalties that SCE may face due to the performance of its 2006-2008 energy efficiency portfolio. As noted above, D.06-12-013 is erroneously silent in this regard.

²³ D.06-11-049, pp. 47-51.

²⁴ *Id.*, p. 52.

²⁵ *See* D.06-12-013, p. 19.

²⁶ In fact, SCE has prepared a Request for Proposal (RFP) for its Permanent Load Shifting (PLS) program and is currently assembling a bidder’s list for delivery of the RFP to interested parties. SCE’s web site states that although providers are not limited to any specific PLS technology, SCE identifies chilled water storage and ice air conditioning as some of the PLS technologies it seeks. *See* www.sce.com/RebatesandSavings/LargeBusiness/DemandResponse/default.htm.

Noteworthy is the Commission's recent treatment of the water-energy efficiency pilot authorized in R.06-04-010, the Energy Efficiency Rulemaking. There, the Commission authorized the utilities to spend an incremental \$10 million (above their 2006-2008 energy efficiency budgets authorized by D.05-09-043) on water-energy efficiency pilot programs, and concluded that savings from these pilots should count neither towards the utilities' 2006-2008 goals nor to any shareholder incentives calculations. Because the purpose of the water-energy pilots will be "to explore the potential for future programs to capture water-related embedded energy savings," the Commission directed the utilities to count the savings from the programs "for the purpose of understanding program benefits, rather than to affect rewards or penalties."²⁷ Here, D.06-12-013 characterizes the TES pilot as having a very similar purpose: to evaluate potential benefits and potential downsides of TES for the purpose of ascertaining the viability of this technology as a demand side resource. (D.06-12-013, p. 19). Moreover, D.06-12-013 lacks any findings or even discussion that would support treating the TES pilot any differently than the water-energy pilot for the purposes of impacting shareholder incentives.

Accordingly, if the Commission does not exclude the TES pilot authorized by D.06-12-013 from SCE's energy efficiency portfolio outright, then TURN and DRA request that the Commission grant rehearing to remedy the decision's silence regarding the treatment of potential savings from the TES pilot. Consistent with the purpose of pilot programs, and the Commission's recent treatment of the water-energy efficiency pilot, D.06-12-013 should be modified to direct that TES impacts will not affect rewards or penalties in SCE's 2006-2008 energy efficiency portfolio. No other outcome is supported by the Commission's findings in D.06-12-013 or the record in this proceeding.

²⁷ See *Assigned Commissioner's Ruling on Process Related to the Consideration of Embedded Energy Savings Related to Water Efficiency*, issued 10/16/06 in R.06-04-010, p. 3, Ruling Paragraphs 3-4.

IV. Conclusion

For the foregoing reasons, TURN and DRA recommend that the Commission grant limited rehearing of D.06-012-013. Without modification, D.06-12-013 runs afoul of §§ 1705 and 1757 of the PU Code, which require that Commission decisions be supported by findings of fact and conclusions of law, and substantial evidence in light of the whole record. The Commission's treatment of the TES Pilot, authorized as part of the Palm Desert Project in D.06-12-013, fails to satisfy these requirements.

January 16, 2007

Respectfully submitted,

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On Behalf of Division of Ratepayer Advocates

CERTIFICATE OF SERVICE

I, Cory Oberdorfer, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

I served the attached:

APPLICATION FOR REHEARING OF DECISION 06-12-013

by sending said document by electronic mail to each of the parties on the attached
Service List **A.05-06-004**

Executed this January 16, 2007, in San Francisco, California.

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CALIFORNIA PUBLIC UTILITIES COMMISSION

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